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# VILLAGE OF WILMETTE

WILMETTE, ILLINOIS 60091

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November 24, 1993

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NOV 29 1993

FCC - MAIL ROOM

Office of the Secretary  
Federal Communications Commission  
1919 M Street N.W.  
Washington, D.C. 20554

**RE: In the Matter of:  
Guidelines for Evaluating the Environmental Effect of  
Radio Frequency Radiation**


**ET Docket No. 93-62**

Dear Sir,

Please find attached a reply memorandum submitted by the Village of Wilmette, Cook County, Illinois, in response to the petition of Sheldon L. Epstein filed with the Commission in the above-captioned case.

Additionally, Mr. Epstein has requested that the Village submit with its reply a surreponse letter drafted by him. The Village take no position on the permissibility of such an additional submission and makes no recommendation as to the treatment it should be given by the Commission, but includes it with the Village's materials for the convenience of the parties and the Commission.

Very Truly Yours,

  
Timothy J. Frenzer  
Corporation Counsel

TJF/  
encl.

cc: Heidi J. Voorhees  
Village Manager

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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION

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In the Matter of:

GUIDELINES FOR EVALUATING THE  
ENVIRONMENTAL EFFECTS OF  
RADIO FREQUENCY REGULATION

ET Docket. No. 93-62

FCC - MAIL ROOM

REPLY MEMORANDUM OF VILLAGE OF WILMETTE,  
ILLINOIS TO PETITION OF SHELDON L. EPSTEIN  
CONCERNING PREEMPTION OF LOCAL LAWS REGULATING  
PUBLIC EXPOSURE TO RADIO FREQUENCY RADIATION

The Village of Wilmette, Cook County, Illinois, an Illinois Home Rule municipal corporation, respectfully submits this Reply Memorandum to the Members of the Commission in response to the Petition of Sheldon L. Epstein, filed with the Commission in this matter.

I. INTRODUCTION

A. The Village of Wilmette

The Village of Wilmette is located in Cook County, Illinois, north of Chicago. Wilmette is an Illinois Home Rule municipality, which under the Illinois Constitution, means that the Village possesses largely the same authority as the state legislature to exercise police powers within its jurisdiction, unless specifically preempted by a state statute or the state constitution.<sup>1</sup>

Wilmette has a population of approximately 26,600 residents,

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<sup>1</sup> Ill. Const., Art. VII, § 6.

occupying a territory of 5.4 square miles. The overwhelming majority of this territory, approximately 94%, is zoned and occupied as either residential or institutional, that is schools, parks, churches, and the like. Wilmette has no large areas used principally for industrial purposes. Areas not occupied as residential are generally used for retail, service, office, and light commercial uses.

**B. Resolution 93-R-34**

On September 26, 1993, the Village adopted Resolution 93-R-34, which was subsequently amended October 26, 1993. A copy of the amended Resolution is attached hereto.

The Resolution sets forth non-binding guidelines for public exposure to radio frequency (RF) radiation for new installations of cellular telephone transponders. These guidelines are intended to assist local zoning officials in determining whether a new transponder would satisfy public health and safety requirements of the Village's Zoning Ordinance. The standards set forth in the Resolution were developed by the Village based on a study by a cellular telephone license holder (Ameritech Mobile Communications, Inc.) of the level of radiation an actual installation would cause.

The Resolution was developed by the Village in order to implement a public health and safety policy of "prudent avoidance" based on the absence of clear evidence concerning the health effects of long term exposure to RF radiation. Through this policy the Village seeks to minimize public exposure to an uncertain health risk while at the same time accommodating the legitimate

interests of cellular telephone users and license holders.

## **II. REPLY**

On October 31, 1993, the Village received a copy of a Petition filed with the Commission by Sheldon L. Epstein, a resident of the Village. In reply to Mr. Epstein's petition, the Village presents the following:

### **A. The Village Does Not Prohibit TVRO Satellite Dishes**

Point 8 of Mr. Epstein's petition states that the village "prohibits the erection and use of any TVRO (Television Receive Only) antenna having a reflector in excess of 6 feet in diameter." The Village's Zoning Ordinance in Section 6.4.12 does not prohibit the installation of satellite dishes greater than 6' in diameter. It does require the owner to request Special Use approval from the Village, which is designed to address local concerns over aesthetics and placement. In fact the Village has granted numerous requests, including GMAC (1000 Skokie Boulevard), Crate and Barrel (1515 Sheridan Road), Walgreens (811 Green Bay Road), Edward D. Jones (1225 Central Avenue), the Church of Jesus Christ of Latter Day Saints (2701 Lake Avenue) and Continental Cablevision (1139 Wilmette Avenue.) The last installation was voluntarily removed by the owner for business reasons, but the other five dishes are still in place.

### **B. FCC Regulations Do Not Completely Preempt Local Controls on TVRO Satellite Antennas**

In paragraph 9 of his petition, Mr. Epstein states that the Village "ignores" a prior preemption order of this Commission which bars enforcement of its zoning ordinance concerning TVRO antenna

installations. The FCC does not absolutely preempt the Village's right to regulate satellite dishes. The Commission's Order of February 7, 1986, 51 Fed. Register 5519, still permits municipalities to regulate TVRO installations to address legitimate local health, safety, and aesthetic objectives. In the only recent case on this subject involving the Village, the local circuit court ruled that the Village's ordinance was legal, but also that the ordinance could not be applied to require the removal of a TVRO antenna at a particular location due to the inability of the owner to receive the broadcast signals satisfactorily. Other nearby municipalities also regulate these installations through building permits, zoning requirements, or both.

**C. The Village Has Not Pursued Numerous Lawsuits**

In paragraph 10 of his petition, Mr. Epstein states that the Village has "brought expensive lawsuits" against residents with TVRO antennas. In fact, the Village has brought only one lawsuit regarding satellite dish antenna, referenced in Subsection B, supra.

**D. The Village Has Not Brought Any Lawsuit Against Ameritech Mobile Communications Concerning Any Cellular Transponder**

In paragraph 11 of his Petition, Mr. Epstein states that the Village brought an "unsuccessful and expensive suit against Ameritech Mobile Communication, Inc." to force it to cease use of a cellular transponder site. The Village, in fact, has not brought any lawsuit against Ameritech concerning the transponder site in question. At the time of the transponder installation, the site was located outside the corporate limits of the Village, and

private parties brought the lawsuit to prevent the installation. Following the conclusion of that litigation and the installation of the transponder, the site was annexed to the Village.

**E.     Resolution 93-R-34 Does Not Prohibit the Construction of Additional Cellular Telephone Transponder Sites in the Village**

In paragraph 21 of his Petition, Mr. Epstein states that Resolution 93-R-34 has the impermissible net effect of banning any further installations of cellular telephone transponders in the Village of Wilmette. This is not accurate.

Resolution 93-R-34 does provide guidelines for the location of new cellular antenna and does recommend against the location of transponders in certain areas, such as in residential neighborhoods and nears schools and day care centers. It contains no such recommendation with respect to other areas, providing the RF radiation is within the Resolution's recommended standards.

Far from subjecting an applicant to an arbitrary process, the Resolution's effect is to render more objective any debate over the merits of a proposed new installation. The Resolution's RF radiation standards were derived from a study in which Ameritech placed a test transponder in an elevated location in the Village and tested it at a power level sufficient to provide service to its customers in the area. The standards set forth in the Resolution reflect these tests results.

It is axiomatic that state and local governments have the authority to exercise their inherent police powers to protect the

public health and safety. In the area of communications, this Commission has, as in the instance of its Rules concerning TVRO satellite antennas, recognized and accommodated local control over issues concerning public health, safety and aesthetics. Traditionally, such local regulations in the communications area are deemed preempted by federal law only where it is impossible for a license holder to comply with both federal and local law.<sup>2</sup> The exposure standards recommended in the Resolution are derived from a license holder's own data on RF radiation from a test site that would enable the license holder to provide cellular service. The Resolution's terms therefore do not make compliance impossible and should not be preempted.<sup>3</sup>

**F. The Village of Wilmette is Not an "Active Litigator" Against the Commission's Orders and Regulations**

In paragraph 28 of his Petition, Mr. Epstein states that the Village of Wilmette "has shown itself to be an active litigator," allegedly spending at least \$250,000.00 to frustrate the Commission's rules and regulations.

As stated before, the Village has to date been a party to only one lawsuit regarding TVRO antennas and none regarding cellular telephone transponders. In its lone court case, the Village sustained no direct costs since the litigation was handled by in-house counsel, and no expert witnesses were presented. The Village

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<sup>2</sup> See e.g., Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984).

<sup>3</sup> See Littlejohn, J., The Impact of Land Use Regulation on Cellular Communications: Is Federal Preemption Warranted?, 45 Fed.Comm.L.J. 247 (1993), and discussion therein.

is certainly not engaged in a campaign of attempting to thwart the Commission.

### III. CONCLUSION

Based on all the foregoing, the Village respectfully submits that Mr. Epstein's Petition seeks to have this Commission exercise sweeping preemption powers based on an erroneous view of the actions of municipalities, and of Wilmette in particular. Cities and villages will vary widely in their land use patterns and topography, making the control of public exposure to RF radiation a uniquely local problem. Strategies which might work well for an area with mountains or highlands may be ineffectual for municipalities without such topographical features. Where, as in Wilmette, the regulatory approach does not prevent a license holder from reasonably exercising the activity permitted by the Commission, local controls should not be preempted on the sweeping basis argued by Mr. Epstein.

Respectfully submitted,  
VILLAGE OF WILMETTE,  
ILLINOIS

BY:

  
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